

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2013 MSPB 96**

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Docket No. AT-3443-12-0159-I-1

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**Kevin Cortez Bean,  
Appellant,**

**v.**

**United States Postal Service,  
Agency.**

December 11, 2013

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John R. Macon, Memphis, Tennessee, for the appellant.

Arthur S. Kramer, Esquire, Philadelphia, Pennsylvania, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of the initial decision that dismissed his constructive suspension appeal for lack of jurisdiction without a hearing. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND this appeal for further adjudication.

**BACKGROUND**

¶2 The appellant is a preference eligible veteran who received a medical discharge from the military for posttraumatic stress disorder. Initial Appeal File (IAF), Tab 1 at 1, Tab 12, Exhibit (Ex.) 5a. According to the appellant's treating

psychologist, his symptoms are triggered by darkness. She therefore recommended that the appellant be scheduled to work only during daylight hours. IAF, Tab 12, Exs. 2, 5a, 7.

¶3 The appellant's civilian employment is as a Mail Handler at an around-the-clock facility, so, for a time, the agency was able to accommodate his condition simply by scheduling him to work the day shift. IAF, Tab 1 at 1, Tab 12, Ex. 7. Specifically, the appellant works at the Memphis Network Distribution Center, which operates in shifts or "tours." Tour 2 is the day shift, and it runs from 6:30 a.m. to 3:00 p.m. Petition for Review (PFR) File, Tab 1 at 51, 57.<sup>1</sup> For over 2 years, the agency scheduled the appellant on tour 2, thus confining his work more or less to daylight hours. IAF, Tab 12, Ex. 1. There is every indication that this arrangement allowed the appellant to perform all the essential functions of his Mail Handler position and that it met both the appellant's and the agency's needs for as long as it lasted. *Id.*, Exs. 5a, 7.

¶4 However, on August 8, 2011, the agency notified the appellant that his tour 2 bid was being excessed and that he was being reassigned from the day shift to the swing shift—tour 3, which runs from 3:00 to 11:30 p.m.<sup>2</sup> PFR File, Tab 1 at 51. The appellant found that arrangement unacceptable because it would have

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<sup>1</sup> The Board normally confines its evidentiary review to the record below and evidence submitted on petition for review that was not available for submission below despite the party's due diligence. See [5 C.F.R. § 1201.115](#). Nevertheless, under the particular circumstances of this case, we find that it furthers the interest of justice for the Board to consider all of the evidence in the file. See [5 C.F.R. § 1201.12](#). Specifically, development of the record below was hampered by the agency's failure to submit its response file as the administrative judge directed. IAF, Tab 2 at 7; see [5 C.F.R. § 1201.25](#). Moreover, the evidence on review is primarily useful insofar as it helps to paint a more cogent picture of the underlying facts; we would reach the same conclusion even in the absence of this evidence.

<sup>2</sup> "Excessing" is essentially reassignment to reduce the number of employees in an overstaffed work unit. See Agreement between the National Postal Mail Handlers Union and the United States Postal Service, Article 12.6.

required him to work into the night, contrary to his doctor's recommendations. He requested that the agency reconsider and submitted a doctor's note in support of his request. IAF, Tab 12, Ex. 2. Nevertheless, on August 27, 2011, the agency began enforcing the appellant's new schedule, preventing him from clocking in on tour 2 and insisting that he clock in on tour 3 instead. IAF, Tab 12, Ex. 3. Thereafter, the appellant began taking a large amount of sick leave, annual leave, and leave without pay in order to avoid having to work on tour 3. It is not clear from the record exactly how much leave the appellant used, but it appears to have been well in excess of 14 days. PFR File, Tab 1 at 61-74. Although the appellant requested reasonable accommodations and submitted supporting medical documentation, it appears that the agency was never able to find an accommodation upon which the parties could agree. IAF, Tab 12, Exs. 1, 5a, 7, 8.

¶5 The appellant filed a Board appeal challenging the agency's decision to reschedule him to tour 3 and arguing that it failed to offer him a reasonable accommodation. IAF, Tab 1 at 2-3. The administrative judge construed this as a constructive suspension claim and directed the appellant to file evidence and argument to establish Board jurisdiction over his appeal. IAF, Tab 3. After receiving the appellant's jurisdictional submission, the administrative judge dismissed the appeal for lack of jurisdiction without a hearing. IAF, Tab 15, Initial Decision (ID) at 1, 3. Relying on *Johnson v. U.S. Postal Service*, [110 M.S.P.R. 679](#), ¶ 15 (2009), she found that the appellant's choice between working after dark and requesting leave was perhaps unpleasant but nevertheless voluntary. ID at 3.

¶6 The appellant has filed a petition for review, arguing among other things that the agency's failure to retain him in tour 2 was improper and that the administrative judge should not have decided the appeal without a hearing. PFR File, Tab 1 at 2-11. The agency has not filed a response.

## ANALYSIS

¶7 The Board lacks jurisdiction over appeals of employees' voluntary actions. *O'Clery v. U.S. Postal Service*, [67 M.S.P.R. 300](#), 302 (1995), *aff'd*, 95 F.3d 1166 (Fed. Cir. 1996) (Table); [5 C.F.R. § 752.401](#)(b)(9). However, the Board has always recognized that employee-initiated actions that appear voluntary on their face are not always so. *Spiegel v. Department of the Army*, [2 M.S.P.R. 140](#), 141 (1980). The Board may have jurisdiction over such actions under 5 U.S.C. chapter 75 as "constructive" adverse actions. For instance, the Board has found that a retirement based on agency misinformation or a resignation based on intolerable working conditions is tantamount to a removal and is thus appealable to the Board. *E.g.*, *Salazar v. Department of the Army*, [115 M.S.P.R. 296](#), ¶ 12 (2010); *Bates v. Department of Justice*, [70 M.S.P.R. 659](#), 671-72 (1996). Likewise, even if an employee applies for and accepts a reduction in grade or pay, that action may nevertheless be appealable if the employee can show that the agency deprived him of any meaningful choice in the matter. *E.g.*, *Jones v. Department of Agriculture*, [117 M.S.P.R. 276](#), ¶ 15 (2012); *Goodwin v. Department of Transportation*, [106 M.S.P.R. 520](#), ¶ 15 (2007).

¶8 Like involuntary resignations, removals, and reductions in pay or grade, involuntary leaves of absence may be appealable to the Board under chapter 75 as constructive suspensions.<sup>3</sup> The Board has found jurisdiction over constructive

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<sup>3</sup> This Opinion and Order pertains only to *involuntary* leave constructive suspensions. It does not pertain to *enforced* leave constructive suspensions. Although they share the same name, they are analytically unrelated. Enforced leave suspensions are called "constructive" because they do not fit the literal statutory definition of a "suspension" at [5 U.S.C. § 7501](#)(2), yet they have the same effect. *Perez v. Merit Systems Protection Board*, [931 F.2d 853](#), 855 (Fed. Cir. 1991). Involuntary leave suspensions are called "constructive" because they appear to be voluntary actions but are not. The jurisdictional analysis is completely different between the two, and this Opinion and Order is not intended to address the enforced leave situation. We use the term "constructive suspension" only with reference to the involuntary leave situation unless otherwise indicated.

suspensions in a variety of situations.<sup>4</sup> See *Brown v. U.S. Postal Service*, [115 M.S.P.R. 88](#), ¶ 8 (2010). Although various fact patterns may give rise to an appealable constructive suspension, all constructive suspension claims, and indeed all constructive adverse action claims whatsoever, have two things in common: (1) the employee lacked a meaningful choice in the matter; and (2) it was the agency's wrongful actions that deprived the employee of that choice. Assuming that the jurisdictional requirements of 5 U.S.C. chapter 75 are otherwise met, proof of these two things is sufficient to establish Board jurisdiction.<sup>5</sup>

¶9 For example, in *Scharf v. Department of the Air Force*, [710 F.2d 1572](#), 1574-75 (Fed. Cir. 1983), the appellant's retirement was a constructive removal within the Board's jurisdiction because he reasonably based his decision on the agency's incorrect advice. The choice to retire in that case was not meaningful because it was based on misinformation. See *Covington v. Department of Health & Human Services*, [750 F.2d 937](#), 943 (Fed. Cir. 1984) (a decision made "with blinders on," based on misinformation or a lack of information, cannot be binding

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<sup>4</sup> There is a line of cases beginning with *McNamee-Marrero v. U.S. Postal Service*, [80 M.S.P.R. 487](#), ¶¶ 8-9 (1999), which state that constructive suspension claims arise in "two situations" (one of them being the equivocal "enforced leave" situation discussed above in ¶ 8 n.3). This statement is misleading. As explained in *Brown v. U.S. Postal Service*, [115 M.S.P.R. 88](#), ¶ 8 (2010), the Board has recognized several fact patterns that may give rise to an involuntary constructive suspension.

<sup>5</sup> Another line of Board cases states that the dispositive issue in a constructive suspension appeal is whether the agency or the employee initiated the absence. See, e.g., *Rutherford v. U.S. Postal Service*, [112 M.S.P.R. 570](#), ¶ 10 (2009); *Young v. Department of Veterans Affairs*, [83 M.S.P.R. 187](#), ¶ 21 (1999). As the Board suggested in *Crutch v. U.S. Postal Service*, [119 M.S.P.R. 460](#), ¶ 6 (2013), this is true only in enforced leave-type constructive suspension appeals. The very essence of an involuntary leave-type constructive suspension, such as this one, is that the absence was employee-initiated. The Board has occasionally attempted to apply this "initiation" standard to an involuntary leave-type appeal. See, e.g., *Johnson*, [110 M.S.P.R. 679](#), ¶ 8. Needless to say, this does not further the analysis.

as a matter of fundamental fairness and due process). In addition, it was the agency's improper action, i.e., the supplying of misinformation, that deprived the appellant of his choice. In contrast, a retirement decision based on misinformation that was not the agency's fault is not appealable to the Board. *Holser v. Department of the Army*, [77 M.S.P.R. 92](#), 95 (1997). *But see Bannister v. General Services Administration*, [42 M.S.P.R. 362](#), 366-67 (1989) (a retirement may be appealable as a constructive removal even if the Office of Personnel Management, rather than the employing agency, supplied the misinformation). Although the appellant's choice to retire in *Holser* was no more meaningful than the appellant's choice in *Scharf*, the difference between the two cases is that, in *Scharf*, the misapprehension was due to the agency's improper act, while in *Holser* it was not.

¶10 Again, in *Schultz v. U.S. Navy*, [810 F.2d 1133](#), 1136-37 (Fed. Cir. 1987), the appellant's resignation was a constructive removal within the Board's jurisdiction because she resigned to avoid a threatened adverse action that the agency knew or should have known could not be substantiated. The appellant's choice between resigning and contesting the unfounded adverse action was not a meaningful one because it was a choice between false alternatives. *See Murray v. U.S. Postal Service*, [68 M.S.P.R. 177](#), 181-82 (1995). In addition, it was improper for the agency to threaten a baseless adverse action. In *Garland v. Department of the Air Force*, [44 M.S.P.R. 537](#) (1990), the appellant likewise resigned because of a threatened adverse action. His resignation, however, was not a constructive removal because the agency had reasonable grounds for proposing the action. *Garland*, [44 M.S.P.R. at 540](#). Thus, the appellant in *Garland* had a meaningful choice (not one between false alternatives), and the agency action precipitating his retirement was not improper. He therefore failed to establish either of the jurisdictional conditions of a constructive adverse action.

¶11 The two types of constructive adverse action appeals discussed in ¶¶ 9 and 10 above illustrate the principle that jurisdiction is established by showing: (1) the appellant lacked a meaningful choice, and (2) this was because of the agency's improper actions. Although we cannot fully discuss every fact pattern of constructive adverse action that the Board and the Federal Circuit have recognized, we believe that they are all consistent in this regard, and that this two-part jurisdictional standard is a unifying principle for all of them. *See, e.g., Vaughan v. Department of Agriculture*, [116 M.S.P.R. 493](#), ¶¶ 13-14 (2011) (the appellant nonfrivolously alleged that his disability retirement was a constructive removal because his disability forced him to retire and the disability was caused by the agency's improper acts); *Levy v. Department of Homeland Security*, [109 M.S.P.R. 444](#), ¶ 18 (2008) (a resignation or retirement is a constructive removal if the appellant tried to withdraw her application before its effective date and the agency unjustifiably refused to honor the withdrawal, thus taking the choice away from the appellant and doing so improperly); *Peoples v. Department of the Navy*, [83 M.S.P.R. 216](#), ¶¶ 6-9 (1999) (to establish jurisdiction over a constructive suspension on the basis of intolerable working conditions, the appellant must show both that a reasonable person would have felt compelled to absent himself under the conditions and that the agency was culpable for those conditions); *see also Brown U.S. Postal Service*, [115 M.S.P.R. 609](#), ¶ 17, *aff'd*, 469 F. App'x 852 (Fed. Cir. 2011) (even if the appellant's medical condition left her no alternative but to retire, she failed to tie her circumstances to an improper agency act); *Searcy v. Department of Commerce*, [114 M.S.P.R. 281](#), ¶ 15 (2010) (even if the appellant's resignation was occasioned by improper agency actions, he failed to make a nonfrivolous allegation that those improper actions deprived him of meaningful choice).

¶12 However, the Board and the Federal Circuit often emphasize the involuntariness aspect of constructive adverse action claims to the detriment of the improper agency action aspect.<sup>6</sup> See, e.g., *Holloway v. U.S. Postal Service*, [993 F.2d 219](#), 221 (Fed. Cir. 1993) (“[T]e dispositive inquiry in determining whether there has been [an appealable constructive suspension] is whether the employee’s absence from the agency was voluntary or involuntary.”); *Aldridge v. Department of Agriculture*, [111 M.S.P.R. 670](#), ¶ 7 (2009) (when the Board concludes that an appellant’s action was involuntary, the Board not only has jurisdiction but the appellant also wins on the merits and is entitled to reinstatement). Because the focus is usually on the issue of voluntariness, it is easy to make the mistake of treating that as the only issue in the appeal and of examining all of facets of a case under that lens—even the ones that relate only to agency culpability. This is just what happened in *Johnson*, [110 M.S.P.R. 679](#).

¶13 The appellant in *Johnson* took leave from work for medical reasons and subsequently requested to return in light duty status.<sup>7</sup> [110 M.S.P.R. 679](#), ¶ 2. The agency denied this request on the basis that there was no work available within the appellant’s medical restrictions. The appellant therefore continued his absence and filed a Board appeal alleging constructive suspension. *Id.*, ¶¶ 2-4. The Board dismissed the appeal for lack of jurisdiction, finding that the appellant’s “unpleasant” choice between taking leave and returning to work outside of his medical restrictions was voluntary. *Id.*, ¶ 15. We disagree with the

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<sup>6</sup> Notwithstanding, the Federal Circuit has explicitly recognized, at least in some contexts, that there must be an improper agency action involved as well. E.g., *Staats v. U.S. Postal Service*, [99 F.3d 1120](#), 1123 (Fed. Cir. 1996).

<sup>7</sup> As in the instant appeal, the appellant’s medical condition in *Johnson* had not been ruled compensable. [110 M.S.P.R. 679](#), ¶ 2 n.1. If it had, the appeal would have been analyzed as a restoration appeal, rather than as a constructive suspension appeal. See *Kinglee v. U.S. Postal Service*, [114 M.S.P.R. 473](#), ¶¶ 16-22 (2010) (a restoration appeal subsumes a related constructive suspension claim).

reasoning in *Johnson*, and we find that the administrative judge's reliance on *Johnson* led her to an incorrect result. See ID at 3. First, we note that the basic premise of *Johnson* is that working outside of medical restrictions is somehow a viable option for federal employees. See [110 M.S.P.R. 679](#), ¶ 15. It is difficult to imagine circumstances in which this premise would be acceptable. Second, it appears that, in *Johnson*, the real reason for the dismissal was not that the absence was voluntary (it was not) but that it was not precipitated by an improper agency action. See [110 M.S.P.R. 679](#), ¶ 10 (the administrative judge found that the agency was under no obligation to provide the requested light duty work). The appellant in *Crutch v. U.S. Postal Service*, [119 M.S.P.R. 460](#), ¶¶ 5, 11 (2013), was likewise faced with the choice between taking leave and working outside his medical restrictions, yet the Board found in his favor. Mr. Crutch's absence was no more or less voluntary than Mr. Johnson's. The difference between the two cases has nothing to do with voluntariness. It has everything to do with the impropriety of the agency actions that forced the choice—the failure to accommodate in *Crutch* was improper whereas the failure to accommodate in *Johnson* was not. In fact, the Board in *Crutch* overruled *Moon v. Department of the Army*, [63 M.S.P.R. 412](#), 419-20 (1994), the case upon which *Johnson* relied in finding that the “unpleasant choice” was voluntary.<sup>8</sup> *Crutch*, [119 M.S.P.R. 460](#), ¶ 11 n.2. We likewise overrule *Johnson*.

¶14 In the instant appeal, the essence of the appellant's claim is that he was compelled to take leave because his only alternative was to work after dark, in violation of his doctor's orders, *and* that the agency forced him into this untenable position by improperly taking him off of the tour 2 day shift and otherwise failing to accommodate his condition. IAF, Tab 1 at 3-4. We find that

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<sup>8</sup> The administrative judge in this case issued her initial decision before the Board issued *Crutch*, [119 M.S.P.R. 460](#). Therefore, *Johnson*, [110 M.S.P.R. 679](#), had not been overruled implicitly or explicitly at the time the administrative judge relied on it.

the appellant's allegations, if proven, could establish that he lacked a meaningful choice in the matter and that it was the agency's improper actions that deprived him of that choice. *See supra* ¶ 8. The jurisdictional prerequisites of chapter 75 otherwise appear to be satisfied because the appellant is a preference eligible Postal Service employee with 1 year of current continuous service and his absence lasted for more than 14 days. IAF, Tab 1 at 1; PFR File, Tab 1 at 61-74; *see* [5 U.S.C. §§ 7511](#)(a)(1)(B)(ii), 7512(2). Therefore, under the principles set forth above and the Board's decision in *Crutch*, [119 M.S.P.R. 460](#), we find that the appellant has made a nonfrivolous allegation that he was subjected to an appealable constructive suspension. We therefore remand this appeal for further development of the record, including the submission of the agency's file under [5 C.F.R. § 1201.25](#) and a jurisdictional hearing. *See Moore v. U.S. Postal Service*, [117 M.S.P.R. 84](#), ¶¶ 12-13 (2011).

¶15 On remand, the relevant issues will likely include whether the appellant's medical condition would have compelled a reasonable person to take a leave of absence rather than reporting for duty on tour 3 (if indeed this fact is still in dispute), whether the agency's refusal to allow the appellant to remain on tour 2 was improper, and whether the agency improperly failed to offer the appellant an alternative accommodation that would have allowed him to continue working. In this regard, we note that the agency invoked the collective bargaining agreement as its reason for moving the appellant off of tour 2. PFR File, Tab 1 at 51. We direct the administrative judge's attention to *U.S. Airways, Inc. v. Barnett*, [535 U.S. 391](#), 402-06 (2002), and the Equal Employment Opportunity Commission's Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 31, both of which explain that an accommodation that would violate a collectively bargained seniority system would generally be unreasonable unless the appellant can show that "special circumstances" exist. In any event, based on the appellant's petition for review, it appears to be still in dispute whether retaining him on tour 2 would have

violated the collective bargaining agreement in the first place. Moreover, the record has not yet been fully developed as to whether there were reasonable accommodations available other than retaining the appellant on tour 2.

ORDER

¶16 We remand this appeal for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.